

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2021/43212

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE	SIGNATURE

In the exception proceedings between:

PAUL GROSS

Excipient

AND

D[...] M[...]

Respondent

In re:

M[...] D[...]

Plaintiff

AND

M[...] D[...]

First Defendant

M[...] D[...] N.O.

Second Defendant

GROSS PAUL	Third Defendant
THE MASTER OF THE HIGH COURT NORTH GAUTENG	Fourth Defendant
M[...] D[...] B[...]	Fifth Defendant
M[...] A[...] L[...]	Sixth Defendant
OSIRIS INTERNATIONAL TRUSTEES LIMITED	Seventh Defendant
OSIRIS CORPORATE SOLUTIONS (MAURITIUS) LIMITED	Eighth Defendant
TRESCALINI PROPERTY INVESTMENT (PTY) LIMITED	Ninth Defendant
WEDNESDAY HOLDINGS LIMITED	Tenth Defendant
BVI BAY SPIRIT TRADE & INVEST (PTY) LIMITED	Eleventh Defendant
INTELLIGENT LEARNING SOLUTIONS (PTY) LIMITED	Twelfth Defendant
INTELLIGENT SOLUTIONS INVESTMENT LIMITED BVI	Thirteenth Defendant
M[...] E[...] S[...] (PTY) LIMITED	Fourteenth Defendant
MALAPILA CATHERINE SALELENI	Fifteenth Defendant

Summary: Practice — Pleadings — Divorce action — Third defendant is a *peregrine* of this Court — Court lacks jurisdiction over third defendant in terms of section 21 of the Superior Courts Act 10 of 2013 — Exception to particulars of claim on ground that it is not disclosing a cause of action — Novel claims involving development of common law and declaration of constitutional invalidity of section 21 of the Superior Courts Act 10 of 2013 — Relief claimed against third defendant pleaded with sufficient particulars to establish a triable issue against the excipient — Facts

complex and legal position uncertain — Novel and unprecedented relief claimed not inconceivable under our law — Not suitable to determine jurisdiction during exception stage.

ORDER

As a result, the following order is made

1. The exception is dismissed with costs, including the costs of two counsel.

JUDGMENT

WINDELL J

Introduction

[1] This judgment deals with an exception raised by the third defendant, Paul Gross (excipient), against the plaintiff/respondent's (Ms M[...]) third amended Particulars of Claim ("POC"),¹ on the ground that this court lacks jurisdiction over the excipient in terms of section 21 of the Superior Courts Act² ("the Act").

[2] In the action (instituted on 9 September 2021) the plaintiff seeks the dissolution of the marriage between her and her husband, the first defendant (Mr M[...]), as well as wide-ranging relief against certain foreign trusts and individuals, including the excipient. It is common cause that the marriage occurred in

¹ Amended on 9 February 2023.

² 10 of 2013.

Johannesburg, an antenuptial agreement was concluded between the parties in Johannesburg and Mr M[...] resides in Johannesburg.

[3] By virtue of the provisions of Section 2 of the Divorce Act³ the court (Gauteng Division, Johannesburg) has jurisdiction in the “divorce action” pending between the plaintiff and Mr M[...]. “Divorce action” is defined in section 1 of that Act as follows: *“‘divorce action’ means an action by which a decree of divorce or other relief in connection therewith is applied for...”*

[4] The plaintiff is seeking an order that Mr M[...] pay her an amount equivalent to one-half of the difference in the net accruals of their respective estates as part of the *“other relief in connection therewith”*. This relief is being sought in accordance with section 4 of the Matrimonial Property Act⁴. The plaintiff claims that Mr M[...]’s estate is composed of, among other things: *“assets which are situated within the Republic of South Africa and held in nominee arrangements including assets held by the third respondent [excipient], including the immovable property situated in Cape Town, (‘the Clifton Property’) and shares in private companies”*. The plaintiff thus seeks a declarator that the Clifton Property is beneficially owned by Mr M[...].

[5] Section 21(1) of the Act provides that *“A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance,...”* (My underlining). The trial court will therefore have to ascertain whether the excipient is a nominee for Mr M[...] when determining the plaintiff’s accrual claim. If so, the value of the Clifton Property must be considered in the quantification of the plaintiff’s accrual claim against Mr M[...]. The plaintiff’s claims against Mr M[...] and the excipient were therefore initiated within the court’s jurisdiction (Gauteng Division, Johannesburg) as outlined in section 21(1) of the Act.

[6] Although the excipient is the registered owner of the Clifton property, he is a foreign *peregrine* who resides, alternatively, has his place of business in the United

³ 70 of 1979.

⁴ 88 of 1984.

Kingdom. Section 21(1) of Act provides that the court has no jurisdiction over any person who does not reside in or is not in the jurisdiction of that court, except in certain specified instances set out in section 21(2) which reads as follows:

“A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such cause, if the said person resides or is within the area of jurisdiction of any other Division”

It is common cause that none of the exceptions in section 21(2) apply to the excipient.

[7] Section 21 is not a codification of the jurisdiction of the High Court.⁵ In *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)*,⁶ the Appellate Division remarked that because the intention of the legislature was to interfere with the common law as little as possible, section 19(1) of the now repealed Supreme Court Act 59 (the corollary of section 21) was deliberately couched in indefinite wording. Therefore, “*re-course must be had to the principles of the common law to ascertain what competency each of the Supreme courts in the Republic of South Africa possesses to effectively adjudicate and pronounce upon a matter brought before and heard by it*”.⁷

[8] In terms of the common law in certain jurisdictions, the arrest of a foreign *peregrine* or the attachment of his property to either confirm or found jurisdiction was required before the courts would exercise jurisdiction over him.⁸ The purpose of the

⁵ *Nexor 312 (Pty) Ltd v Overberg District Municipality* 2021 JDR 2416 (KZP) at para 16.

⁶ 1987 (4) SA 883 (A).

⁷ Id at 886l. See also Erasmus, *Superior Court Practice*, Second Edition at D164.

⁸ In *Bid Industrial Holdings (Pty) Limited v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA), at para 26 the court referred to the practice in Holland and several other Dutch provinces which “*allowed resident plaintiffs to arrest foreign nationals and to bring them before a local court in order to compel them to give security for their appearance in court or to pay whatever the judgment debt might be. This saved the plaintiffs the expense of proceeding in a foreign country; they could obtain judgment and levy execution in their own domicile*”.

arrest or attachment was to enable the court to grant an effective judgment.⁹ In *Ewing McDonald & Co Ltd v M&M Products Co*,¹⁰ it was held that a court can only exercise jurisdiction over a peregrine if an arrest or attachment of property is made to establish or confirm jurisdiction.¹¹

[9] Attachment of property to found or confirm jurisdiction, is not competent in the present matter as the cause of action against the excipient is declaratory in nature and is not one sounding in money or actions in rem for movable property.¹² And in *Bid Industrial Holdings (Pty) Limited v Strang*,¹³ a judgment concerning the exercise of jurisdiction by a High Court over a foreign *peregrine*, it has subsequently been held that arrest to found or confirm jurisdiction is unconstitutional and therefore not competent.

[10] In certain circumstances South African High Courts do however have jurisdiction in actions against foreign entities, even in the absence of an attachment to found or confirm jurisdiction. In *Strang*,¹⁴ the Supreme Court of Appeal (“SCA”) held that where attachment was possible, it remained a jurisdictional requirement. However, if attachment is not possible, the common law needed to be developed, which development would necessarily involve the provision of practical expedients permitting of the establishment and exercise of jurisdiction. It therefore held that for

⁹ *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries* 1969 (2) SA 295 (A) at 306H-307A.

¹⁰ 1991 (1) SA 252 (A).

¹¹ In *Ewing McDonald supra*, the rule was summarised as follows: “(a) *Where the plaintiff (or the applicant) is an incola and the defendant (or the respondent) is a foreign peregrinus (i.e. a peregrinus of the country as a whole) the arrest of the defendant or the attachment of his property is essential. Since a recognised ratio jurisdictionis by itself will not do it is immaterial whether such arrest or attachment is one ad fundandam jurisdictionem (where there is no other recognised ground of jurisdiction) or ad confirmandam jurisdictionem (where there is). The corollary of this rule is that an incola can pursue his claim where it is most convenient for him to do so, namely, within his own locality, even if his cause of action has no connection with that area other than the arrest or attachment.*”

¹² Voet 2.4.25 (Gane's translation); *McBride & Thomson v Vause* (1889) 3 SAR 3 at 5; *Federation Internationale de Football Association v Sedibe & Another* [2021] 4 All SA 321 (SCA) at para 27; *Ex parte Kahn* (1907) 24 SC 558 at 566–7; *Brown v McDonald* 1911 EDL 423.

¹³ Above n 8.

¹⁴ *Id* at 370B-C.

the purposes of establishing and exercising jurisdiction it would suffice if the summons was served on the defendant while in South Africa and there was a sufficient connection between the suit and the area of jurisdiction of the court concerned, so that the disposal of the case by that court was appropriate and convenient. The Court also remarked that appropriateness and convenience are elastic concepts which can be developed on a case by case basis and obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.¹⁵

[11] It is common cause that there was no service of the combined summons and particulars of claim on the excipient whilst in South Africa. Instead leave was granted by the court to serve the intendit on the excipient by way of edictal citation. The excipient thus submits that the court has no jurisdiction over him and seeks an order upholding the exception and dismissing the plaintiff's claims against him.

The claim against the excipient

[12] It is generally accepted that a summons citing a *peregrine* defendant must allege facts showing that the issuing court has jurisdiction, otherwise it is bad.¹⁶ Where lack of jurisdiction appears from the summons itself, this may be raised by exception.¹⁷

[13] The underlying rationale for the curbing of the jurisdiction over a *peregrine* is the so-called "doctrine of effectiveness". In traversing the provenance of the doctrine, the court in *Ewing McDonald*¹⁸ cited with approval the dictum of the court in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* which in turn quoted with approval the dictum in *Schlimmer v Rising's Executrix*.

¹⁵ Id at para 56.

¹⁶ See *Rieckhoff v Jacobs* 1967 (1) SA 680 (W) at 682A.

¹⁷ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 71G-I.

¹⁸ Above n 10 at 256H-I; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A); *Schlimmer v Rising's Executrix* 1904 TH 108 at 111.

“Now the jurisdiction of the courts of every country is territorial in its extent and character, for it is derived from the sovereign power, which is necessarily limited by the boundaries of the State over which it holds sway. Within those boundaries the sovereign power is supreme, and all persons, whether citizens, inhabitants, or casual visitors, who are personally present within those boundaries and so long as they are so present, and all property (whether movable or immovable), for the time being within those boundaries, are subject to it and to the laws which it has enacted or recognised.”

[14] As remarked in *Strang*, the attachment of property will, unless essentially worthless, obviously provide some measure of security or some prospect of successful execution.¹⁹ In this regard Howie P said the following²⁰:

“[57] As to the principle of effectiveness, despite its having been described as 'the basic principle of jurisdiction in our law' it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been 'trifling'. However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly.

[58] Therefore it seems to me that there are legally competent alternatives to requiring arrest as a jurisdictional prerequisite. Whether they can be established in the proposed litigation between the present parties it is impossible, from the record, to determine. Indeed, whether there are sufficiently close links with the area of jurisdiction concerned and whether effectiveness is likely to be achieved are matters dependent on the facts of each case. They should be canvassed in the pleadings and can, in addition, be dealt with as separated issues in terms of rule 33(4).”

[15] The excipient is cited and joined in the action in that “*he has a direct and substantial interest which may be prejudicially affected by the judgment of the Court by the relief claimed in prayers 9 to 11*”. In prayers 9 to 11 of the POC, the plaintiff seeks a declaratory order that the Clifton Property is beneficially owned by Mr M[...]

¹⁹ Above n 8 at para 38.

²⁰ Ibid at para 57 – 58.

and that this property should be taken into account for purposes of calculating the accrual she is entitled to under the antenuptial agreement. It is alleged in the POC that the relief sought against the excipient is *“inextricably connected”* to the divorce relief *“albeit that such connection is incidental in nature”*.

[16] On 29 September 2021, the court granted leave to sue the excipient by way of edictal citation. Service of the intendit was effected on him by e-mail transmitted by the plaintiff's attorney to his e-mail address, and by service through the sheriff on Mr M[...]’s attorney of record.

[17] In the affidavit in support of the edictal citation application, the plaintiff averred that the excipient had been residing in the United Kingdom for more than two decades; that he is the friend, confidante, and advisor of Mr M[...] and that he holds assets as nominee on behalf of Mr M[...]. She further alleged that the Clifton Property was purchased by Mr M[...] in terms of a written agreement of sale in October 2010 and subsequently registered in the name of the excipient in or about March 2011.

[18] The basis for the declaratory order against the excipient (Claim D), was formulated in the POC in paragraphs 33 to 36 in the following terms:

“33. On or about 30 October 2010 the first defendant, acting personally, and Bridget Mary Halford ("Halford"), the registered owner of Erf 3[...] Clifton, Cape Town, Western Cape Province situated at 2[...] T[...] B[...], Clifton, Cape Town (hereinafter referred to as "the Clifton Property") entered into a written agreement, a copy of which is annexed hereto marked "D" in terms of which Halford sold to the first defendant the Clifton Property for the purchase price of R20 500 000,00 (twenty million five hundred thousand rand).

34. The Clifton Property was registered in the name of the third defendant by the Registrar of Deeds, Cape Town on or about 17 February 2011.

35. Notwithstanding the terms of annexure "D", the Clifton property was registered in the name of the third defendant. The first defendant is the true and beneficial owner of the Clifton property and the third defendant is his nominee. Inter alia the first defendant

35.1 made payment of the purchase price to Halford, alternatively caused payment to be made to Halford from his funds;

35.2. repeatedly told the plaintiff and others that he is the beneficial owner of the Clifton property;

35.3. referred to the Clifton property as a lifestyle asset to benefit the plaintiff, the first defendant and the family;

33.4. makes payment of, alternatively causes payment to be made through companies and trusts controlled by him of all the imposts of the Clifton property and the cost of repairs and maintenance to the Clifton property;

35.5. receives rental income in respect of the Clifton property from short-term Air B&B rentals;

35.6. was provided with the original title deed of the Clifton property by the transferring attorneys.”

[19] The Act, and in particular section 21(2), precludes the court's jurisdiction over the claim in respect of the excipient. The plaintiff seemingly recognised this, and amended her POC to include a prayer for an order that the words “*if the said person resides or is within the area of jurisdiction of any other Division*” in section 21(2) to be struck down as it is alleged that the words are “*repugnant and inimical to the values embodied in Chapter 2 of the Constitution*” to the extent that it does not provide for the joinder of a foreign *peregrine* as a party to an action in circumstances where an effective judgment may be granted against that *peregrine*. She therefore seeks an order for section 21(2) of the Act to be amended and that a reading in of the following words (underlined hereunder) be ordered (Prayer 8 bis).

*“A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such cause, **which shall apply to both local and foreign peregrines, provided that in respect of the latter the relief sought against any such peregrine is capable of being effectively enforced.**”*

To put it differently, the plaintiff seeks a declarator, that section 21(2) of the Act is inconsistent with the Bill of Rights in that her right to dignity (section 10), right to

equality (section 9), right to property (section 25(1)), and access to justice (section 34) is impaired and that the court should therefore change the law pertaining to jurisdiction over claims against a foreign *peregrine*.

[20] In addition, the plaintiff seeks relief that the common law be developed pursuant to section 173 of the Constitution to enable the High Court to exercise jurisdiction over a *peregrine* where:

- (1) leave is granted to sue that *peregrine* by way of edictal citation and directions in relation to the service of the intendit on him is given, and service is rendered in terms of such directions.
- (2) there is sufficient connection between the suit and the area of jurisdiction of the High Court concerned, so that the disposal of the suit by it is appropriate and convenient.

[21] The excipient contends that the constitutional challenge to section 21 of the Act is fundamentally misconceived as there is no basis for the contention that it is inconsistent with the Constitution and constitutionally invalid. It is argued that the remedy for which the plaintiff pleads, namely a striking down of portions of the section and a reading-in of words for which she contends, is nothing more than an invitation for the court to engage in judicial legislation. The excipient argues further that there is no basis for a finding of constitutional invalidity given that the plaintiff has not met the burden of proving violation of her rights to dignity, equality, access to court or the unlawful deprivation of property as protected in sections 9, 10, 34 and 25 of the Constitution.

[22] The excipient further argues that the common law cannot be developed contrary to section 21 of the Act, and the court has no power, expressly or implicitly to override legislation, and in particular section 21 of the Act. Accordingly, and in the absence of declarations of constitutional invalidity in respect of section 21 of the Act, there is no basis for the court to develop the common law in the manner contended for by the plaintiff whether in terms of section 173 of the Constitution or otherwise. It is further submitted that even if the court could develop the common law in conflict with or contrary to the Act which is disputed, there are no grounds for the further

development of the common law (whether in terms of section 173 of the Constitution or otherwise), as alleged by the plaintiff in the POC (as further amended).

[23] Broadly stated, the plaintiff, in opposing the exception contends that both prayers for constitutional invalidity and the development of the common law constitutes triable issues and ought not to be determined by way of exception but rather at the trial of the action, after the ventilation of such facts as may be pertinent thereto. It is contended that the relief claimed does not amount to impermissible judicial law-making, but rather represents an incremental and necessary development of the common law to address a legal deficiency and achieve a just outcome. Allowing jurisdiction over foreign *peregrines* in cases with a sufficient connection to the court's area would align with established principles for determining the appropriate forum. It is submitted that there is no direct conflict between this proposed common law development and the existing statutory provisions in section 21(2) of the Act, as that section governs local *peregrines* while the development would apply to foreign *peregrines* through the edictal citation process.

The development of the common law and constitutional relief

[24] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,²¹ Harms JA stated that exceptions provide a useful mechanism to weed out cases without legal merit. They should be dealt with sensibly and an over-technical approach destroys their utility.²²

[25] It is well-established that the exception stage of the proceedings does not require this court to determine the merits of the plaintiff's claim. Rather, the court is tasked with determining whether the plaintiff has pleaded with sufficient particularity to establish a triable issue against the excipient. A competent exception is made when the nature of the claim is impossible to determine due to the ambiguity of the pleadings or when the pleadings are bad in law, meaning that their contents do not

²¹ 2006 (1) SA 461 (SCA) at 465G-H.

²² *Id* at para 3.

support a discernible and legally recognised cause of action.²³ In *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*,²⁴ Wallis JA remarked that:

“The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.”

[26] For this purpose the facts pleaded in the POC are accepted as correct.²⁵ It must thus be accepted as correct that: (1) Mr M[...] is the true and beneficial owner of the Clifton property; (2) Mr M[...] makes payment or causes payment to be made through his companies and trusts for all costs related to the maintenance and running of the Clifton property; (3) Mr M[...] receives Airbnb rental income in respect of the Clifton property; (4) Mr M[...] was provided with the original title deed of the Clifton property by the transferring attorney; (5) The excipient is the nominee of Mr M[...] for purposes of the Clifton property.

[27] This court's approach to the exception is predicated on three primary factors that can be distilled from the factual and legal issues raised by the objections. The first is whether our law permits the joinder of the excipient to take into account the value of the Clifton property for purposes of determining the plaintiff's accrual claim. I am satisfied that it does. The excipient has a direct and substantial interest in the declaration sought in the action, namely, that he holds the Clifton property nominally, that Mr M[...] is the true owner thereof and that its value consequently falls to be considered in the determination of the plaintiff's accrual claim against Mr M[...].

[28] The excipient will be effectively bound to a determination that Mr M[...] is the beneficial owner of the Clifton property, despite the fact that he is the registered owner, if a declaratory order in the terms sought by the plaintiff is granted.

²³ Cilliers et al Herbstein & Van Winsen *The Practice of the High Courts of South Africa* 5 ed vol 1 at 631; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899E – F.

²⁴ 2013 (2) SA 213 (SCA) at para 36.

²⁵ *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA).

Consequently, the excipient is an essential party to the proceedings, as the court will not examine the plaintiff's claims regarding the beneficial ownership of the Clifton property in the absence of the excipient's participation.

[29] The court has the jurisdiction to enforce the plaintiff's accrual claim against Mr M[...] through a judgement sounding in money, thereby rendering any judgement in relation to the cause in respect of which the excipient has been joined effective. The plaintiff would be denied the portion of the accrual that is due to her if the excipient were not a party to the action. In cases such as the present one, the court's assumption of jurisdiction over the excipient will enable equitable accrual calculations and prevent the abuse of jurisdictional rules to deprive divorcing spouses of their share of accrual.

[30] The second factor to consider is that no foreign jurisdiction is capable of assuming jurisdiction for the purpose of calculating the plaintiff's accrual entitlement. Consequently, the plaintiff will be deprived of the opportunity to have her dispute resolved by an impartial forum and will not have access to the courts. In addition, the matter will become *res judicata* once the trial court has determined the plaintiff's accrual claim, rendering any award in favour of the plaintiff on account of it final, despite the fact that the value of the immovable property in question will not have been reckoned. The effect of the excipient's approach, if sustained, is that the plaintiff will inevitably forfeit a portion of her accrual claim, which is based on one-half of the value of the immovable property in question. It is doubtful whether such outcome will be tolerated by the trial court in the interest of justice.

[31] The third consideration is that it must be accepted that the excipient would not be subject to the jurisdiction of the court, and the plaintiff's accrual claim in the action would not be equitably determined, in the absence of a declaration of constitutional invalidity and a development of the common law. The plaintiff contends that there is a real need for such development, for without it a foreign *peregrine* would not be amenable to the jurisdiction of the High Court in circumstances where (as in this case) the connection between the suit and the area of the court's jurisdiction is overwhelming.

[32] It is with these considerations in mind, that this court must establish whether on all possible readings of the POC no cause of action is made out and that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.²⁶

[33] Firstly, the excipient states that the assessment of whether edictal citation is appropriate has historically been an entirely independent assessment to that relating to the question whether the grounds of jurisdiction are satisfied. While this may be the case, the plaintiff persuasively argues that the proceedings regarding service by way of edictal citation (including the obtaining of leave and instructions, and the rendering of service in accordance with those instructions) offer a reliable indication of whether it is appropriate and convenient for the court to exercise jurisdiction when there is a sufficient connection between the suit and the area of jurisdiction of the High Court in question. It is submitted that the development proposed by the plaintiff represents a practical, rational and equitable solution to the problem of potential litigants being unsuited due to limited jurisdictional rules.

[34] In *Tem bani and Others v President of The Republic of South Africa and Another*,²⁷ Ponnan JA stated that a court must be convinced that a novel claim is necessarily inconceivable under our law as potentially developed under section 39(2) of the Constitution before it can uphold an exception based on the purported non-disclosure of a cause of action. The grant of the order prayed for by the plaintiff is certainly conceivable under our law as potentially developed in terms of section 39(2) of the Constitution. It would signify the court's recognition of the necessity and desirability of exercising jurisdiction over the excipient.

[35] Essentially, it would be a far more significant event for establishing jurisdiction than the service of process on the foreign *peregrine* in South Africa if he were to find himself in South Africa at some point, a presence that would not be known to a litigant seeking to issue process against him. The latter act is merely symbolic and formalistic. I am of the view that the trial court would be required to establish

²⁶ Above n 26.

²⁷ 2023 (1) SA 432 (SCA).

practical expedients and rational and equitable principles that would allow it to exercise jurisdiction over the excipient.

[36] Secondly, the excipient states that the development of the common law in the manner contended for would bring the common law directly into conflict with the provisions of the Act governing the jurisdiction of the court, as well the underlying purpose of that provision. In particular, it is alleged that the conflict would arise because the development of the common law would render section 21(2) of the Act redundant. This is inaccurate, because section 21(2) of the Act pertains to local *peregrines*, whereas the development in question, which involves the edictal citation procedure, pertains to foreign *peregrines*. Consequently, the development of the common law and section 21(2) would serve distinct objectives.

[37] Thirdly, the excipient states that the relief is unsustainable because it amounts to the plaintiff asking this court to extend the jurisdictional grounds recognised in *Strang*. The plaintiff's primary arguments on this point are that *Strang* is cited not because the plaintiff is attempting to expand the jurisdictional grounds established in the case, but rather because the case establishes authoritative jurisdictional principles that, according to the plaintiff, are relevant to the current case. These principles are, inter alia, that: questions of jurisdiction require the determination of the forum most suitable (appropriateness and convenience) for adjudicating the dispute and serving the ends of justice and must be dealt with on a factual basis and developed case by case and the appropriate or natural forum is that with which the action has the most real and substantial connection with. It is contended that these principles are self-evidently pertinent to the relief sought and their application weigh in favour of the development of the common law.

[38] Fourthly, the excipient states that developing the common law in the manner sought would undermine the doctrine of effectiveness because the process of edictal citation assumes that the party concerned is not within the jurisdiction of the court.

[39] The plaintiff recognises the necessity of effective relief and, as a result, proposes a common law development that would limit jurisdiction to cases in which the High Court has determined that it is appropriate to serve the

defendant/respondent via edictal citation, the defendant/respondent has been served via edictal citation, and the suit and the High Court's area of jurisdiction are sufficiently connected for the suit to be resolved in a manner that is both appropriate and convenient.

[40] Consequently, the expanded jurisdiction is only applicable in cases where the High Court is able to provide effective relief. In this context, it is important to note that executory relief is not sought against the excipient in the action. The relief requested is solely declaratory in nature and will have the sole purpose of allowing the High Court to include the value of the immovable property registered in the excipient's name in the calculation of the accrual. Ultimately, the plaintiff argues that the development of the common law is essential to prevent an arbitrary forfeiture of the plaintiff's accrual claim. The court would otherwise lack jurisdiction to consider the value of the excipient's property under the current rules.

[41] Finally, the excipient argues that even if the court was inclined to develop the common law in the way contended for, there is no 'sufficient connection' between the divorce action involving the plaintiff and the excipient and the plaintiff's claim in relation to him. I disagree. Not only is there a compelling connection, but there is no other available forum with competent jurisdiction to deal with the plaintiff's claim against the excipient.

[42] As far as the constitutional challenge to section 21(2) is concerned, the plaintiff relies variously on the following grounds of constitutional invalidity: Impairment of her right to dignity, right to equality, right to property, and access to justice. In addition, the plaintiff contends that the restriction of section 21 to local *peregrini* is irrational. It is required, for purposes of this exception, that the plaintiff satisfy this court that the question pertaining to section 21(2) of the Act has been properly pleaded and is not vague or embarrassing.

[43] The proper approach to assessing a constitutional challenge has repeatedly been confirmed. It is a two-stage test where the court will first, consider whether the impugned provision is inconsistent with the Constitution and, second, if so, whether such limitation is justified under the provisions of section 36 of the Constitution. The

plaintiff bears the burden of demonstrating constitutional invalidity at the first stage. Only then does the burden shift to the defendant to demonstrate justifiable limitation.

[44] The plaintiff argues that: (1) section 21 arbitrarily deprives the plaintiff of her right to property that is akin to her vested right to the accrual claim, and, (2) the plaintiff's otherwise lawful entitlement under the common law is unduly restricted by the complete prohibition under section 21 to join the excipient for the purpose of calculating the accrual claim.

[45] The excipient argues that the plaintiff's claim does not pass the threshold test for asserting a violation of the right to property. The case pleaded in the POC is that the excipient's registered property is beneficially owned by the Mr M[...]. The plaintiff therefore has no property right in her cause of action. At best, she has a derivative claim to proceeds from the property in the event that the primary claim - declaring Mr M[...] the beneficial owner — is successful and in the event that the plaintiff is then successful in the relevant aspect of the divorce proceedings.

[46] The excipient contends that there is therefore no direct constitutional right to property implicated at all, and, in any event, the constitutional protection is against the *arbitrary* deprivation of property where this is not pursuant to a law of general application. It is submitted that there is no allegation in the POC of an arbitrary deprivation of the plaintiff's property and section 21 is demonstrably a law of general application. The challenge to section 21 of the Act based on the right to property is therefore confused.

[47] In *First National Bank (FNB)*,²⁸ the Constitutional Court held that, "*in a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned*".²⁹ It is thus apparent that the term "deprivation" is subject to a

²⁸ *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

²⁹ *Id* at para 57.

wider meaning. Consequently, a broad variety of interferences may be regarded as a deprivation of the right and the free enjoyment of it.

[48] Once deprivation has been established, the inquiry is whether the requirements of section 25(1) are satisfied. The deprivation must occur in accordance with law of general application and the law in terms of which the deprivation occurs must not be arbitrary. Courts will endeavour to achieve the necessary balance between the public purpose of the statutory provision in question and the individual right to property when evaluating arbitrariness.³⁰

[49] In evaluating the plaintiff's claim, I am satisfied, at least to the extent of the value of the Clifton property, that the POC raises a triable issue in that section 21(2) will preclude the plaintiff from enforcing her accrual claim against the excipient in its current form. In doing so, the provision has the effect of arbitrarily depriving the plaintiff of her right of access to property — in that but for the statutory provision, she will not be able to enjoy the full complement of her accrual entitlement.

[50] The excipient acknowledges that the objective of section 21 is to guarantee the effective enforcement of court orders and remedies. Consequently, the requested relief is limited to the removal of the statutory impediment against the establishment of jurisdiction over a foreign *peregrine* in the context of the common law or its potential development.

[51] The plaintiff argues that the exclusionary nature of section 21 has a further prejudicial consequence, specifically the impairment of her right to equality. It is contended that as a result of an arbitrary differentiation that does not accurately reflect the common law position and has a discriminatory effect against the plaintiff in comparison to Mr M[...]’s position, the accrual claim of the plaintiff will be diminished. As a result of the impact of section 21 on the quantification of the accrual claim and the resulting injury, the right to equality is violated.

³⁰ Id at para 109.

[52] The excipient contends that the plaintiff's equality challenge is fundamentally flawed. In essence, the plaintiff must demonstrate discrimination on one of the grounds listed in section 9(3) or, alternatively, must demonstrate discrimination which impairs her dignity or affects her in a comparably serious nature in order to be considered unfair. It is alleged that the plaintiff does not allege unfair discrimination on one of the grounds listed in section 9(3) and there is no basis in the pleadings to contend that the court's absence of jurisdiction in respect of a foreign *peregrine* (who is not her husband) affects the plaintiff's dignity and therefore constitutes unfair discrimination on a ground that is not listed under section 9(3).

[53] Our courts have acknowledged that marital systems (civil, customary, and religious) have historically included provisions that, despite their apparent neutrality, provide women with fewer rights and benefits.³¹ In *Volks NO v Robinson and Others*,³² the Constitutional Court recognised the reality of structural dependence of women in marriage relationships in South Africa.³³ The plaintiff argues that the differentiation that results from section 21 must therefore be read in this context. It is, in effect, a differentiation on the grounds of gender, a differentiation which is presumed to be unfair discrimination in terms of section 9(3) of the Constitution.

[54] I am satisfied that the plaintiff's POC sufficiently demonstrate that section 21, while formally applying equally to all plaintiffs, has the effect of disadvantaging divorcing spouses, particularly women, whose husbands register their property in the hands of foreign *peregrines* with the sole purpose of concealing their wealth and diminishing the divorcing spouse's accrual claim.

[55] The plaintiff further pleads that section 21 also impairs the plaintiff's right to dignity. The excipient contends that while the value of human dignity is undeniably at the core of the constitutional protections, it is implicated most particularly where the individual concerned belongs to a particularly vulnerable group, has suffered historical discrimination and disempowerment or where a particularly intimate or

³¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 95; *Daniels v Campbell NO* 2004 (5) SA 331 (CC).

³² 2005 (5) BCLR 466 (CC).

³³ *Id* at para 63.

sensitive sphere of human endeavour is involved. It is submitted that “*it is difficult to comprehend the assertion that the plaintiff’s constitutional right to dignity is infringed by her inability to pursue a foreign peregrinus who is not her husband in divorce proceedings where, on her own pleadings, she is accustomed to regularly holidaying both locally and abroad at luxurious hotels and resorts, driving expensive motor vehicles, generally sparing no expense and purchasing designer clothing and designer household goods*”.

[56] In my view, the plaintiff’s lifestyle is extraneous to the issue of her dignity being impaired. The Constitutional Court in *Ferreira v Levin*,³⁴ has recognised that there exists a strong correlation between the right to dignity and individual freedom. Dignity is not merely a self-contained right; it is also a value that reinforces the right to equality.³⁵ It is alleged by the plaintiff that by depriving the plaintiff of her equality of arms in the accrual action, section 21 impinges and deprives the plaintiff of her dignity. I am satisfied that such claim is legally plausible.

[57] It is also pleaded that section 21 has the effect of curtailing the plaintiff’s rights of access to the courts, in that the plaintiff will be non-suited in relation to the accrual calculation in relation to the Clifton property.

[58] The excipient contends that section 21 of the Act does not unjustifiably restrict the right of access to court. The underlying rationale is one of effectiveness which entails that in the absence of a competent attachment, a plaintiff must pursue the defendant in his jurisdiction. It is argued that this is nothing more than an expression of the well-established principle *actor sequitur forum rei*.³⁶ The excipient further submits that section 21, and in particular section 21(2), merely codifies this principle. It is averred that the plaintiff is in no different position than any plaintiff involved in foreign proceedings where the dispute is subject to the courts of a foreign jurisdiction. Thus, to the extent that the plaintiff has a claim against a foreign

³⁴ *Ferreira v Levin NO and Others; Vryenhoek And Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 49.

³⁵ *Hugo v President of the Republic of South Africa and Another* 1997 (4) SA 1 (CC) at para 41.

³⁶ According to the Oxford Dictionary: The plaintiff follows the forum of the property in suit, or the forum of the defendant’s residence.

peregrine, and in the absence of any other basis for jurisdiction, the plaintiff must pursue that foreign defendant in the courts that have jurisdiction over him and there is no denial of access to court.

[59] I have already alluded to this aspect earlier in the judgment. The plaintiff is deprived of any recourse before the courts and, as a result, from having her dispute adjudicated before an impartial forum, as no foreign jurisdiction is capable of assuming jurisdiction for the purpose of calculating the plaintiff's accrual entitlement in respect of it. In my view, the plaintiff has undoubtedly established a triable issue on this matter.

CONCLUSION

[60] The excipient submits that the relief sought is drastic and devoid of any legal foundation. I disagree. At most, the plaintiff's claim against the excipient and the concomitant relief sought can be described as novel and unprecedented.

[61] At the exception stage of the proceedings, this court is not obliged to determine the questions of constitutional invalidity and development of the common law. This principle is best illustrated in judgments of the SCA and Constitutional Court. The first is *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*,³⁷ which dealt with a delictual claim based on a novel legal duty not to act negligently. Wallis JA remarked that the existence of such a duty depended on the facts of the case and "*a range of policy issues*", which required the court to be "*fully informed in regard to the policy elements*". The enquiry therefore "*militates against that decision being taken without evidence*". He stated that, if a novel or unprecedented claim was "*legally plausible*" then it must be determined in the course of the action.

[62] In *Tembani and Others v President of The Republic of South Africa and Another*,³⁸ the SCA had the occasion to consider whether novel claims involving the

³⁷ Above n 26.

³⁸ Above n 29.

development of the common law ought to be adjudicated on exception. The Court held that while there is no general rule that issues relating to the development of the common law cannot be decided on exception, there may be occasions when the factual situation is complex, and the legal position is uncertain and where the question of the development of the common law would be better served after hearing all the evidence.³⁹

[63] In support of its conclusion the Court placed reliance on the Australian case of *Harriton v Stephens*,⁴⁰ where Kirby J (in dissent) observed:

“Especially in novel claims asserting new legal obligations, the applicable common law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built. Where the law is grappling with a new problem, or is in a state of transition, the facts will often ‘help to throw light on the existence of a legal cause of action — specifically a duty of care owed by the defendant to the plaintiff’. Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent.”

[64] Ponnann JA remarked that this approach ensures compliance with section 39(2) of the Constitution, which requires courts to develop the common law by promoting the spirit, purport and objects of the Bill of Rights, inasmuch as it places a court in a position to make a final decision “*after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors*”. He concluded:

³⁹ Id at para 15.

⁴⁰ *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52, (2006) 226 ALR 391 at para [35]; Quoted with approval by the Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

“It is thus only if the court can conclude that it is impossible to recognise the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld. Hence, courts must assess the various arguments for and against the recognition of what may be perceived as a novel claim and in doing so the normative matrix of the Constitution and the Bill of Rights must be applied for the purposes of determining whether the claim may be recognised in law.”⁴¹

[65] The Constitutional Court has repeatedly emphasised that exception proceedings are not the appropriate method for resolving intricate legal and factual matters. In *H v Fetal Assessment Centre*,⁴² the Court went so far as to assert that:

“Even if the conclusion is reached that the limits of our law of delict will be stretched beyond recognition for harm of this kind to be recognised within its niche, our Constitution gives our courts the liberty to develop motivated exceptions to common law rules or even recognise new remedies for infringement of rights. For present purposes the point remains the same: the child’s claim is not necessarily inconceivable under our law.” (My underlining)⁴³

[66] In *Pretorius and Another v Transport Pension Fund and Others*,⁴⁴ the Constitutional Court dismissed the exception, but held that the dismissal does not deprive the defendant of the opportunity of raising the same defences as substantive defences in their respective pleas and for their merits to be determined after the leading of evidence at the trial. Froneman J stated that it is probably, “*a better way to determine the potentially complex factual and legal issues involved*”.

[67] In *Van Der Merwe v Road Accident Fund and Another (Women’s Legal Centre Trust as Amicus Curiae)*⁴⁵ Moseneke DCJ remarked that courts should not

⁴¹ Above n 29 at para 16.

⁴² Above n 42.

⁴³ *Id* at para 66.

⁴⁴ 2019 (2) SA 37 (CC) at para 22.

⁴⁵ 2006 (4) SA 230 (C) at para 7.

pronounce on the validity of legislation without the benefit of hearing the organ of State concerned:

“[7] Wisely so, none of the other parties opposed her being made a party to these proceedings because the grievance of non-joinder of the Minister before the High Court is a good one. On a number of occasions this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity.”

[68] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd*,⁴⁶ Fabricius J faced a jurisdictional objection similar to the one in the current case. He endorsed the principle formulated in *Strang*, that questions of jurisdiction require the determination of the forum most suitable (appropriateness and convenience) for the ends of justice, which had to be dealt with on a factual basis and developed case by case. He further reiterated that the appropriate or natural forum is that with which the action has the most real and substantial connection and that the determination of questions of real and substantial connection involves an analysis of “*background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business etc.*”⁴⁷ The court ultimately held that the plaintiff’s POC raised a triable issue, and that the jurisdiction question ought to be finally decided by the trial court.

⁴⁶ 2014 (3) SA 265 (GP).

⁴⁷ Id at para 23.

[69] The court has not had the benefit of argument on behalf of the State. The determination of the exception in the present matter raises important and complex questions regarding, among other things: the nature and extent of the facts that connect the suit to the Johannesburg High Court, and whether it is the forum of convenience for determining the *lis* between the plaintiff and the excipient in light of it; the invasive nature of section 21(2) of the Act; whether it impacts on the constitutionally protected rights of the plaintiff, and if so, the extent to which it does so; the question whether the invasive nature of section 21(2) is justifiable on any constitutional basis; the question whether the remedy sought by the plaintiff to address the wrong complained of is in the particular circumstances of the case appropriate and, if so, the precise formulation of what needs to be read into section 21(2); and, the need to develop the common law to, in effect, provide for a different mode of effective service on a foreign *peregrine* in circumstances where the purely fortuitous presence of that *peregrine* in South Africa to permit of the service of process on him is not capable of attainment.

[70] The determination before this court is whether the plaintiff has pleaded with sufficient particularity to establish a triable issue against the excipient. I am satisfied that the question pertaining to the development of the common law and the validity of section 21(2) of the Act has been properly pleaded and is not vague or embarrassing. The constitutional challenge to section 21(2) postulate factual enquiries which can only be addressed during the course of a trial. The plaintiff has raised a triable issue, and the trial court should be the ultimate arbiter of the sufficiency of the connection for the purpose of establishing jurisdiction against the excipient. On this score the approach of Fabricius J in *Multi-Links* was entirely appropriate.

[71] It is accepted that for purposes of convenience, there may be a separation of issues at a later stage, to allow the joinder of the Minister of Justice to the proceedings in accordance with Rule 10A and the publication of the constitutional issue raised in accordance with Rule 16A of the Rules of this court.

[72] In the result the following order is made:

1. The exception is dismissed with costs, including the costs of two counsel.

L WINDELL
JUDGE OF THE HIGH COURT
JOHANNESBURG

***Delivered:** This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 August 2024.*

APPEARANCES

Counsel for the excipient/third defendant:	Advocate A.D. Stein SC
Instructed by:	TWB – Tugendaft Wapnich Banchetti and Partners
Counsel for the respondent/plaintiff:	Advocate G. Farber SC
	Advocate S. Kazee
Instructed by:	Billy Gundelfinger Attorneys
Date of hearing:	11 March
Date of judgment:	6 August 2024